

This Opinion is Not a
Precedent of the TTAB

Mailed: September 14, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Res-Care, Inc.

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Serial No. 90309408

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Amy Sullivan Cahill of Steptoe & Johnson PLLC,
for Res-Care, Inc.

April E. Reeves, Trademark Examining Attorney, Law Office 124,
Lydia Belzer, Managing Attorney.

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Before Lykos, Adlin and Johnson,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Res-Care, Inc. (“Applicant”) seeks to register the mark EQ LEARNING in standard characters on the Principal Register for services ultimately identified as “Providing employment counseling services” in International Class 35 and “Educational services, namely, providing live online instruction, online group seminars, and education courses offered through online non-downloadable videos to individuals seeking employment, all in the field of employment counseling for job

placement; online educational testing” in International Class 41.¹

The Trademark Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is deceptively misdescriptive of Applicant’s identified services.

Applicant timely filed a notice of appeal following issuance of a final refusal.² The appeal is briefed. We affirm the refusal as to both classes of services.

I. Evidentiary Objections

The Examining Attorney objects to the exhibits submitted with Applicant’s brief consisting of (1) copies of third-party registrations, and (2) purported copies of portions of their prosecution history,³ on the ground that the evidence is untimely under Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d). We sustain the objection.

Applicant incorporated in its January 6, 2022 Office Action Response a chart summarizing certain third-party registrations. Applicant also submitted portions of their application files (i.e. the purported specimens in connection with their prosecution history). In the February 13, 2022 Final Office Action, the Examining

¹ Application Serial No. 90309408, filed November 10, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), claiming a bona fide intent to use the mark in commerce.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. Citations to briefs refer to the actual page number, if available, as well as TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² Following Applicant’s response to the first Office Action, the Examining Attorney did not maintain a mere descriptiveness refusal under Section 2(e)(1), but instead issued a deceptively misdescriptiveness refusal. *See* May 3, 2021 and July 13, 2021 Office Actions.

³ 5 TTABVUE (exhibits to appeal brief).

Attorney advised Applicant that the mere listing of the registrations in chart form was insufficient to make them of record, citing amongst other authorities *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018). She explained that in order to make the third-party registrations of record, Applicant was required to submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems (i.e. TSDR), prior to appeal. See *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2064 (TTAB 2013). The Examining Attorney further advised that with a single exception,⁴ the purported specimens from the third-party registration files were not properly of record because "much of the writing is illegible" and because the materials "are primarily Internet evidence, without the URL and date captured."⁵ She instructed Applicant to submit (1) an image file or printout of the downloaded webpages, (2) the date the evidence was downloaded or accessed, and (3) the complete URL address of the webpage, prior to appeal. See *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018).⁶

Instead of filing a request for reconsideration, either prior to or concurrently with its notice of appeal, Applicant waited until the briefing to attempt to make this evidence of record. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 1203.02(e), 1204 and 1207.01 (2022). This is too late. "The record in the application should be complete prior to the filing of an appeal. Evidence should not be

⁴ January 6, 2022 Office Action Response TSDR 61-63 (Ex. I).

⁵ *Id.*

⁶ *Id.*

filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d).⁷ See *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019).

Accordingly, we have not considered the exhibits attached to Applicant's appeal brief.

II. Deceptive Misdescriptiveness Refusal

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of designations that are deceptively misdescriptive of the goods or services to which they are applied in the absence of a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). See, e.g., *In re Hinton*, 116 USPQ2d 1051, 1051-52 (TTAB 2015) (proposed mark “THCTea” deceptively misdescriptive of tea-based beverages not containing THC); *In re Schniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006) (proposed mark SEPTEMBER 11, 2001 deceptively misdescriptive of history books and entertainment services not pertaining to the events of September 11, 2001).

A mark is considered deceptively misdescriptive if (1) the mark misdescribes a quality, feature, function, or characteristic of the goods or services with which it is used; and (2) consumers would be likely to believe the misrepresentation. *In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 479, at *9 (TTAB 2021), *appeal dismissed*, No. 2021-2114, 2021-2115 (Fed. Cir. May 6, 2022) (citing *In re Budge Mfg. Co.*, 857 F.2d

⁷ Alternatively, after filing the notice of appeal, Applicant could have filed a separately captioned written request to suspend the appeal and for remand to make the evidence properly of record but did not do so. See Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d).

773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988)); *Hinton*, 116 USPQ2d at 1052; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013) (citing *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984)). “The Board [applies] the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe.” *Hinton*, 116 USPQ2d at 1052 (citing *R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985)). *See also Dolce Vita Footwear*, 2021 USPQ2d at *11.

A. Does Applicant’s Mark Misdescribe the Identified Services?

As the starting point for our analysis, for a term to misdescribe services, the term must be merely descriptive of a significant aspect of the services which the identified services could plausibly possess, but in fact do not. *Hinton*, 116 USPQ2d at 1052; *Schniberg*, 79 USPQ2d at 1312; *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002). “A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).⁸ This determination must be made in

⁸ By contrast, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the [services].” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. *See Nautilus*

relation to the services for which registration is sought, not in the abstract. *Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those services, and the possible significance that the mark would have to the average purchaser of the services in the marketplace. *Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the [services].” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

To show that EQ LEARNING merely describes a significant aspect that Applicant’s International Class 35 and 41 services could plausibly possess, the Examining Attorney has submitted an online entry from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE showing that “EQ” is an abbreviation for “emotional intelligence.”⁹ The dictionary further shows that “emotional intelligence” is “the ability to monitor one’s own or others’ emotions,”¹⁰ or “the capacity to blend

Grp., Inc. v. Icon Health & Fitness, Inc., 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

⁹ May 3, 2021 Office Action TSDR 2.

¹⁰ July 13, 2021 Office Action TSDR 2.

thinking and feeling to make optimal decisions.”¹¹ The word “learning,” when used as a noun, is defined as “the act of gaining knowledge.”¹²

To further illustrate the meaning of the abbreviation EQ, the Examining Attorney made of record third-party websites showing use of the term EQ in connection with employment counseling and educational services as signifying the ability to manage social interactions, emotions and conflict at work. By way of illustration, we note the following:

EQ Coaching Solutions’s website, a career coaching company, states: “Emotional Intelligence or EQ, are your personal and social competencies which research shows are the strongest predictor of career success. . . . By helping them to fully utilize their EQ, you enable your leaders to become better connectors and builders of relationships.”¹³

CEUonestop offers a professional development webinar for career professionals focusing on EI. “Emotional Intelligence, also known as EI or EQ, is a set of skills that help you navigate relationships, interact with others, and manage your own emotions. As you may expect, it includes elements such as empathy and self-awareness, but it also includes stress-management, flexibility, and assertiveness. . . . This webinar will introduce you to the concept of EQ and its importance, and how it manifests in your daily life and career.”¹⁴

HelpGuide, a nonprofit behind a group of mental health websites, states “Emotional intelligence (otherwise known as emotional quotient or EQ) is the ability to understand, use, and manage your own emotions in positive ways to relieve stress, communicate effectively, empathize with others, overcome challenges and defuse conflict” and “many

¹¹ May 3, 2021 Office Action TSDR 4.

¹² *Id.* at 3.

¹³ July 13, 2021 Office Action TSDR 7.

¹⁴ *Id.* at 16.

companies now rate emotional intelligence as important as technical ability and employ EQ testing before hiring.” HelpGuide also believes “The skills that make up emotional intelligence can be learned at any time. However, it’s important to remember that there is a difference between simply learning about EQ and applying the knowledge to your life.”¹⁵

Taken together, this evidence demonstrates that the abbreviation EQ modifies the noun LEARNING to indicate a type employment counseling and instruction. Thus, EQ LEARNING merely describes a significant characteristic or feature that the services could plausibly possess.

To ascertain whether EQ LEARNING misdescribes Applicant’s services, during prosecution, the Examining Attorney made an information request under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b), which included the following questions:

- a. What is the meaning of “EQ” in relation to applicant’s services?
- b. Will applicant’s educational services teach emotional intelligence?
- c. What is the subject matter of applicant’s educational services?
- d. Will applicant’s services counsel on emotional intelligence?
- e. Will applicant’s services test emotional intelligence?¹⁶

Applicant responded:

- a. The “EQ” of EQ LEARNING was chosen to align with the company logo, and the company’s overall approach to providing employment counseling for job placement

¹⁵ May 3, 2021 Office Action TSDR 9-11.

¹⁶ *Id.* at 1.

activities [through] the company's Employment Quadrants of the company's Talent Delivery Model.

- b. No.
- c. Employment counseling for job placement using the company's proprietary content/guide *Career Accelerate*.
- d. No.
- e. No.¹⁷

Applicant's responses unequivocally establish that EQ LEARNING misdescribes Applicant's employment counseling and educational services.

B. Would a Reasonably Prudent Consumer Believe the Misrepresentation?

Having met the first prong of the test, we turn to the question of whether a reasonably prudent consumer would be likely to believe the misrepresentation. To establish this element of the test, the Examining Attorney points to evidence showing that competitors in the field promote to consumers the benefits of employment counseling and education services designed to improve the consumer's EQ or "emotional intelligence." Note the following examples:

Simeon's Pivot Resources, a consulting company focusing on performance improvement, asks, "What influences the career development of an individual? . . . The answer to all these questions is emotional intelligence or emotional quotient (EQ)" and states "When hiring people, along with job abilities and skills, employers are looking for higher EQ. The interviews are tailored such that they can measure EQ and predict how well the candidate will be suitable for the job role."¹⁸

¹⁷ June 8, 2021 Office Action Response TSDR 8.

¹⁸ July 13, 2021 Office Action TSDR 9.

Career Thought Leaders, an organization for career industry professionals, provides a webinar by Deborah Westcott, Founder and CEO of coachEQ, and Marie Zimenoff, CEO of Career Thought Leaders for sharing “coaching strategies to uncover blind spots that stall candidate’s career growth and practical tools for increasing emotional intelligence.”¹⁹

Teresa Shaffer Executive Coach states: “Research shows the link between Emotional Intelligence (EQ) and job performance. . . . Learning to improve your EQ will give you the potential to be a more effective and influential leader. . . . Go to my webpage so you can increase your EQ.”²⁰

Edythe Richards at A Top Career has been “a professional career counselor for 20 years and an educator for 25+ years” and reports that “Emotional Quotient (EQ) is estimated to account for up to 45% of job success.” She also touts a proprietary EQ model as “one of the most valuable tools for selecting and developing the workforce of tomorrow.”²¹

Peak Careers, a firm specializing in professional development for career practitioners, offers a class entitled “EQ at work: Emotional Intelligence for Career Practitioners”; “In this class, we will explore the concept of Emotional Intelligence (EQ) using Reuven Bar-On’s model of Emotional Intelligence: EQ-I 2.0. By developing a greater understanding of your own EQ strengths and opportunities, you will be able to apply them to your work as a career practitioner.”²²

Dynamic Leadership with Al Ruttan offers EQ assessments for measuring emotional intelligence that may be used in applications including “Career Counseling/Outplacement Services.”²³

¹⁹ *Id.*

²⁰ February 13, 2022 Final Office Action TSDR 2-3.

²¹ *Id.* at 9-11, 14.

²² July 13, 2021 Office Action TSDR 11.

²³ February 13, 2022 Final Office Action TSDR 6-8.

Rose + Porterfield business consulting and services touts: “Our coaching and consulting services include: . . . EQ skill-building.”²⁴

Executive coach Leila Bulling Towne offers a course to “Learn to raise your EQ to help you in work and in life” where the instructor will “share key emotional intelligence insights and tangible and practical activities to help you raise your emotional intelligence fast, a little a time [sic].”²⁵

TalentSmartEQ, a company specializing in business skills training offers: “Mastering EQ certification programs give you all the skills and tools you need to deliver sustainable, ongoing EQ learning experiences that will drive success throughout your organization,”²⁶ as well as an educational program on “Hiring for Emotional Intelligence” where participants can “[d]iscover how EQ is used in the hiring process, and explore what high and low EQ look and sound like at your organization.”²⁷

Teachers College, Columbia University offers a course in “Leveraging emotional intelligence (EQ) to enhance organizational effectiveness” where students learn about “EQ assessments” and “applied insights to leadership development strategies including executive coaching.”²⁸

This evidence shows that consumers are accustomed to encountering in the marketplace career counseling and education services touting the advantages of the acquisition of knowledge and learning skills pertaining to EQ or emotional intelligence. It is therefore likely that the reasonably prudent consumer (i.e. job

²⁴ *Id.* at 20.

²⁵ *Id.* at 22.

²⁶ *Id.* at 25.

²⁷ *Id.* at 35.

²⁸ *Id.* at 31.

seekers, and those looking for career advice or advancement) will be deceived by Applicant's misrepresentation.

Applicant counters that consumers would not perceive its proposed mark EQ LEARNING as identifying services involving the subject of "emotional intelligence." Rather, Applicant postulates that consumers will understand that the designation EQ refers to the "evidenced-informed Talent Delivery Model (TDM)- Employability Quadrants (EQ) [Applicant uses] to prepare applicants for employment."²⁹ Elaborating, Applicant explains that

[j]ob seekers have access to Applicant's services using e-learning platforms including Google Workspace Essential Education and LinkedIn Learning for self-paced job preparation activities and skills development. Taken together, these materials comprise Applicant's learning platform [known] as "EQ Learning" as shown below. Applicant's services have nothing to do with gaining emotional intelligence.³⁰

Applicant also argues that consumers will recognize EQ as a nod to the corporate logo of its related company, Equus Workforce Solutions:³¹



²⁹ Applicant's Brief, p. 3; 4 TTABVUE 6.

³⁰ *Id.*

³¹ *Id.*

Given the nature of Applicant's services, and the evidence that competitors in the industry frequently use EQ to describe to consumers the subject matter of their career counseling and educational services, we are unpersuaded that prospective consumers, most of whom are likely unfamiliar with Applicant's "evidenced-informed Talent Delivery Model (TDM)- Employability Quadrants (EQ)," would attribute any other meanings to Applicant's mark.

C. Conclusion

Upon consideration of the entirety of the record and arguments, we find that Applicant's standard character mark EQ LEARNING deceptively misdescribes the services identified in International Classes 35 and 41 within the meaning of Trademark Act Section 2(e)(1), and is therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness under Section 2(f).³²

Decision: The deceptive misdescriptiveness refusal under Trademark Act Section 2(e)(1) is affirmed as to both classes of services.

³² To be clear, Applicant did not seek, in the alternative, registration under Trademark Act Section 2(f).